Subject Index

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1972

No. 71-1428

KIRBY J. HENSLEY, *Petitioner,*

vs.

MUNICIPAL COURT, SAN JOSE-MILPITAS JUDICIAL DISTRICT, SANTA CLARA COUNTY, STATE OF CALIFORNIA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT

OPINIONS BELOW

The decision of the United States District Court for the Northern District of California denying petition for writ of habeas corpus is unreported, and is set out at App. 29a. The District Court's order denying reconsideration, but granting a certificate of probable cause, is unreported and is set forth at App. 30a.

The decision of the United States Court of Appeals for the Ninth Circuit is officially reported at 453 F. 2d

1252 (9th Cir. 1972) and is set out at App. 32a-34a. The order of the Court of Appeals denying petition for rehearing and rejecting suggestion for rehearing in banc is set forth at App. 35a.

JURISDICTION

The judgment of affirmance of the Court of Appeals was entered on January 19, 1972. A timely filed petition for rehearing in banc was denied on February 18, 1972. The petition for writ of certiorari was filed on May 2, 1972, and was granted on October 10, 1972. The jurisdiction of this Court was invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED FOR REVIEW

Whether or not a person released on his own recognizance following trial, conviction and sentence on a state criminal charge is within the purview of 28 U.S.C. §2241(c)(3), which extends the remedy of habeas corpus to persons "in custody" in violation of the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Article I, Section 9:

". . .

"The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

28 U.S.C. §2241:

"Power to grant writ:

* * *

(c) The writ of habeas corpus shall not extend to a prisoner unless——

(3) He is in custody in violation of the Constitution . . . of the United States;"

Cal. Penal Code §§1318-1318.8 (West, 1968), provide as follows:

§1318

"Upon good cause being shown, any court or magistrate who could release a defendant from custody upon his giving bail, may release such defendant on his own recognizance if it appears to such court or magistrate that such defendant will surrender himself to custody as agreed by following the provisions of this article."

§1318.4

To be released on his own recognizance the defendant shall file with the clerk of the court in which the magistrate or judge is presiding an agreement in writing duly executed by him, in which he agrees that:

(a) He will appear at all times and places as ordered by the court or magistrate releasing him and as ordered by any court in which, or any magistrate before whom, the charge is subsequently pending.

(b) If he fails to appear and is apprehended outside of the State of California, he waives extradition.

(c) Any court or magistrate of competent jurisdiction may revoke the order of release and either return him to custody or require that he give bail or other assurance of his appearance as elsewhere provided in this chapter.

§1318.6

After a defendant has been released pursuant to this article, the court in which the charge is pending may, in its discretion, require that the defendant either give bail in an amount specified by it or other security as elsewhere provided in this chapter. The court may order that the defendant be committed to actual custody unless he gives such bail or gives such other security.

§1318.8

The court to which the committing magistrate returns the depositions, or in which an indictment, information or appeal is pending, or to which a judgment on appeal is remitted to be carried into effect, may, by an order entered upon its minutes, direct the arrest of any defendant who has been released upon his own recognizance and his commitment to the officer to whose custody he was committed at the time of such release, and his detention until legally discharged, in the following cases:

(a) When he failed to appear as agreed.

(b) When he was required to give bail or other security as provided in Section 1318.6 and has failed to do so.

(c) Upon an indictment being found or information filed in cases provided in Section 985.

STATEMENT OF CASE

Petitioner Kirby J. Hensley was convicted of a misdemeanor on June 25, 1969. Thereafter on July 1, 1969, Hensley was sentenced to one year in jail plus $625 fine for violation of Section 29007 of the California Education Code. Since that time, Petitioner has been out of custody on his own recognizance.[1]

The District Court did not reach the substantive issues raised in the petition for writ of habeas corpus, but denied the petition on the basis that the court lacked jurisdiction over the matter citing the controlling decision of *Matysek v. United States,* 339 F.2d 389 (9th Cir. 1964), holding that the custody requirement of 28 U.S.C. §2241(c) (3) is not met by one at liberty on his own recognizance.

On October 10, 1972, this court granted Hensley's petition for writ of certiorari.

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[1]Hensley has been at large on his own recognizance at all times since his conviction. Initially, the state court stayed execution of sentence. At the exhaustion of Hensley's state remedies, the district court issued a stay of execution pending habeas proceedings therein. After the petition was denied, the Circuit Justice granted a stay pending appeal to the Court of Appeals. Following the affirmance of the denial of habeas corpus, the Court of Appeals granted a 30-day stay of its mandate pending application for certiorari. This stay was subsequently extended by the Circuit Justice pending the Court's action on a timely filed petition for a writ of certiorari, to remain in effect pending the judgment of this Court.

ARGUMENT

A Defendant Convicted Of A State Offense Who Is At Liberty On His Own Recognizance When His Federal Habeas Petition Is Filed Is Not "In Custody" For Purposes Of The Federal Habeas Corpus Statute.

Since our country's birth, Congress has provided legislation to permit individuals in custody to petition for habeas corpus.[2] The extent of the habeas jurisdiction has changed throughout the years.[3] In 1948, the present 28 U.S.C. §2241 came into being. A consistent and necessary requirement of all the federal habeas corpus *(ad subjiciendum)* statutes was that jurisdiction could not extend to a person unless he was in actual, physical custody.

This court has recognized that some form of custody is necessary:

> "The federal habeas corpus statute requires that the applicant must be 'in custody' when the application for habeas corpus is filed." *Carafas v. La Vallee,* 391 U.S. 234, 238 (1967).
>
> "Of course, custody in the sense of restraint of liberty is a pre-requisite to habeas, for the only remedy that can be granted in habeas is some form of discharge from custody." *Fay v. Noia,* 372 U.S. 391, 427 fn. 38 (1963).

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[2] "[E]ither of the justices of the Supreme Court as well as judges of the district court which have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of commitment—provided that writs of habeas corpus shall in no case extend to prisoners in gaol, unless where they are in custody under or by color of the authority of the United States. . . ." Section 14 of the Federal Judiciary Act of September 24, 1789 (1 Stat. 78, 81-82)

[3] Act of 1833, 4 Stat. 634-635; Act of 1867, 14 Stat. 385; Act of 1874, 1874 revised Stats., Section 751-753; Act of 1925, 43 Stat. 940.

Custody was not defined in specific terms by Congress, nor has this court specifically defined custody. In *Jones v. Cunningham*, 371 U.S. 236, 238 (1963) this court stated:

> "The habeas corpus jurisdictional statute implements the constitutional command that the writ of habeas corpus be made available. While limiting its availability to those 'in custody', the statute does not attempt to mark the boundaries of 'custody' nor in any way other than by the use of that word attempt to limit the situations in which the writ can be used. To determine whether habeas corpus could be used to test the legality of a given restraint on liberty, this Court has generally looked to common-law usages and the history of habeas corpus both in England and in this country."

While the Constitution in Article I, Section 9, provides the minimum criteria for the grant of federal habeas corpus, Congress has enlarged upon that minimal grant to permit the federal courts to entertain a broader range of applicants for federal habeas. However, the jurisdiction of the federal courts is nonetheless not absolute; its power is restricted by the limitations imposed upon it by Congress.[4] The extent of the constitutionally provided federal habeas as envisioned by the framers of the constitution was

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[4] "At the time the privilege of the writ was written into the Federal Constitution it was settled that the writ lay to test any restraint contrary to fundamental law, which in England stemmed ultimately from Magna Charta but in this country was embodied in the written Constitution. Congress in 1867 sought to provide a federal forum for state prisoners having constitutional defenses by extending the habeas corpus powers of the federal courts to their constitutional maximum." *Fay v. Noia*, 372 U.S. at 426.

to free a person accused of the crime from actual physical custody in jail *on bail*, not to free him *from bail*. *See McNally v. Hill*, 293 U.S. 131, 137-138 (1934). *See also Payton v. Roe*, 391 U.S. 54 (1968) (reversed on other ground).

This court has long recognized that an applicant for federal habeas corpus must be in a position to benefit from the writ, *i.e.*, to be released from custody, whether immediately or in the future. Where the applicant is already free either on bail or otherwise, the court is powerless to grant any relief. *Johnson v. Hoy*, 227 U.S. 245, 247, 248 (1913); *Stalling v. Splain*, 253 U.S. 339 (1920).[5]

Mr. Justice Rehnquist in his dissent in *Strait v. Laird*, 406 U.S. 141, 146 (1972), aptly points out that "notions of custody have changed over the years." Those changing notions, however, cannot be such as

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[5] "Of course if there is no prisoner to release, if there is no custody to be discharged, if there is no such restraint as requires relief, then the civil court has no power to interfere with the military court or other tribunal over which it has by law no appellate jurisdiction.

The writ of *habeas corpus* is not a writ of error, though in some cases in which the court issuing it has appellate power over the court by whose order the petitioner is held in custody, it may be used with the writ of *certiorari* for that purpose. In such case, however, as the one before us it is not a writ of error. Its purpose is to enable the court to inquire, first, if the petitioner is restrained of his liberty. If he is not, the court can do nothing but discharge the writ. If there is such restraint, the court can then inquire into the cause of it, and if the alleged cause be unlawful it must then discharge the prisoner." *Wales v. Whitney*, 114 U.S. 564 at 570.

Furthermore, by voluntarily giving bail to appear in Wyoming, the purpose of the removal proceedings have been accomplished and all questions in controversy in the habeas corpus and in the removal proceedings terminated, whether his arrest and detention had originally been valid was, therefore, rendered immaterial. *In re Esselborn*, 8 F. 904.

to depart completely from the reasonable meaning of the term "custody". However, should the court determine that a defendant released on his own recognizance is eligible for federal habeas corpus, that determination would be one not founded on either constitutional or legislative authority, but rather on judicial fiat.

The Petitioner's brief at Page 9 suggests that the conditions imposed on a defendant's release on his own recognizance are of such magnitude that permit the invocation of federal habeas corpus. However, when compared with the restraints on liberty as delineated in *Jones v. Cunningham, supra,* the conditions under which the defendant was released pale into insignificance.[6]

As the first circuit stated in *Allen v. United States,* 349 F. 2d 362 (1st Cir. 1969) wherein a federal prisoner who was out on bail following an appeal was denied habeas corpus by that court on the basis that the only restraint imposed on that defendant was the requirement to subject himself to the court upon reasonable notice, which condition did not restrain the defendant nor constitute custody of him.

Interestingly, Petitioner fails to include *in toto* Section 1318 of the California Penal Code, which section

[6]Petitioner is confined by the parole order to a particular community, house, and job at the sufferance of his parole officer. He cannot drive a car without permission. He must periodically report to his parole officer; permit the officer to visit his home and job at any time; and follow the parole officer's advice. He is admonished to keep good company and good hours; work regularly; keep away from undesirable places; and live a clean, honest, and temperate life. *Jones v. Cunningham,* 371 U.S. at 242.

contains the substantive basis for a release on one's own recognizance. That section reads as follows:

> Upon good cause being shown, any court or magistrate who could release a defendant *from custody* upon his giving bail, may release such defendant on his own recognizance if it appears to such court or magistrate that such defendant will surrender himself *to custody* as agreed by following the provisions of this article. Cal. Penal Code §1318 (West 1968) (emphasis supplied).

By statutory definition, a defendant released on his own recognizance is discharged from custody subject only to the termination of that status by a magistrate for either the failure to appear when ordered or the failure to give bail or other security determined necessary by that court. Until that time, a released person is free to do as he or any other person in our community wishes. He is not required to remain in any particular community, house or job (this Petitioner has in fact traveled widely during the last 3½ years since his conviction). He can drive a vehicle if he wishes, and he need not report to any person.

Were this court to extend habeas jurisdiction pursuant to 28 U.S.C. §2241 to individuals in the position of this Petitioner, the probable increase in the rate of habeas petitions would substantially increase as contrasted with the increase experienced between 1961 and 1971.[7]

[7]See Appendix A attached hereto.

CONCLUSION

We respectfully submit that the judgment of the United States Court of Appeals should be affirmed.

Dated, San Jose, California,
December 18, 1972.

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(Appendix A Follows)